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No.

In The

Supreme Court of the United States

October Term, 1983

DONALD PAUL COLEMAN

versus

CONSTANCE JEAN COLEMAN

CHRIS ALLEN FRITZ,

Petitioner and Intervenor

ON PETITION BY CHRIS ALLEN FRITZ FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

CHARLES E. RICE
(Counsel of Record)
Notre Dame Law School
University of Notre Dame
Notre Dame, Indiana 46556
(219) 239-5667

THOMAS PATRICK MONAGHAN
Catholic League for Religious
and Civil Rights
1100 West Wells Street
Milwaukee, Wisconsin 53233
(414) 289-0170

Attorneys for Chris Allen Fritz

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Questions Presented.

There are three questions presented for review:

A. Is a husband and father's right to protect a particular child conceived by him protected by the Thirteenth Amendment because the denial of fatherhood and the destruction or exile of a child was an "actual condition" of American slavery?

B. Did *Roe v. Wade* and *Doe v. Bolton* mandate that a mother has "an absolute constitutional right to an abortion on demand"?

C. What are the standards for mootness in abortion litigation where the subject matter is always "capable of recurring, yet evading judicial review" and the Court has returned to "substantive due process" concepts?

Parties

The party to the cause is Chris Allen Fritz who filed the Motion To Intervene in *Coleman v. Coleman*.

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Opinions Below

The Maryland Court of Special Appeals opinion in *Fritz v. Hagerstown Reproductive Services et al.* is reported at 454 A.2d 846 (1983). The Maryland Court of Special Appeals opinion in *Coleman v. Coleman* is reported at 471 A.2d 1115 (Md. App. 1984). On March 6, 1984, the Maryland Court of Appeals dismissed *Coleman v. Coleman* on the parties' request and dismissed Petitioner/father Fritz's Motion to Intervene. The Motion to Intervene is Appendix B and the Order of Dismissal is Appendix A.

Jurisdiction

Jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1257 (3). The final order sought to be reviewed was entered on March 6, 1983, by the Maryland Court of Appeals, the highest court of the State of Maryland. The Order is reproduced in Appendix A. This petition was filed within the ninety day period following that entry.

Constitutional Provisions Involved

The following provision of the United States Constitution is involved in this case.

Amendment XIII.

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress shall have power to enforce this article by appropriate legislation.

Statement of the Case

Donald Paul Coleman filed an action in the Circuit Court, Montgomery County, Maryland to preclude the abortion of his child by Constance Jean Coleman, his wife. He stated that the abortion was sought under circumstances of abortion on demand. Mr. Coleman further stated that the intent to abort the life of his unborn child was in contravention of his rights as the father of the unborn child under the Ninth and Fourteenth Amendments.

Mr. Coleman and Mrs. Coleman were married on February 11, 1982. Following the marriage, Mrs. Coleman expressed her desire to have children (T.15). Preceding the pregnancy which became the subject of this legal action, Mr. and Mrs. Coleman had marital relations on a regular basis, and in mid-December, 1983, Mrs. Coleman announced that she was pregnant (T.14). The conception was voluntary and not due to any failure of any birth control measures. Mrs. Coleman initially accepted the pregnancy but subsequently changed her mind (T.16), stating to him that she did not want to support the child (T.17). Mrs. Coleman did not take the stand in all the hearings and has ostensibly taken the position that she is entitled to an abortion on demand for no explicated reason. The trial court volunteered that Mrs. Coleman did not have to testify under the Fifth Amendment (T.83).

Dr. Jerome Lejeune and Dr. Bernard Nathanson testified at the hearing. Jerome Lejeune, M.D., is a Professor of Fundamental Genetics in the Faculty of Medicine of Paris. He is the discoverer of the cause of Down's Syndrome, the first known chromosomal disease. This discovery opened a new field of research in human genetics. Dr. Lejeune was the recipient of the first Kennedy Award, and the William Allen Memorial medal which is the highest award for genetics in the world. He is a member of the American Academy of Arts and Sciences and of similar academies in Sweden, Italy, Britain, Argentina and Denmark, as well as being a member of the Pontifical Academy of Science. Presently, Dr. Lejeune is doing research to find a cure for Down's Syndrome.

Dr. Nathanson was a co-founder of the National Association for the Repeal of Abortion Laws and a director of the largest abortion clinic in the world in New York City. In fact, the alleged and now non-existent "established medical fact of safety" cited in *Roe v. Wade,* 410 U.S. 113 (1973), was based on Dr. Nathanson's data and experience. However, Dr. Nathanson's testimony was against abortion, as his experience with that data has brought him to a pro-life position. He is a board-certified obstetrician-gynecologist and author of *Aborting America* (1979) and *The Abortion Papers: Inside the Abortion Mentality* (1983).

The testimony of these two medical experts is produced in full in the Appendix to this Petition as that evidence applies not only to the specifics of the *Coleman* case or the *Fritz* case or the Motion to Intervene, but to every instance of abortion. As such, this testimony, a symphony of facts, is a most appropriate record for legislative inquiry into abortion, and accordingly this testimony of truth is presented to this Honorable Court. *(See* Appendix C.)

Judge Stanley B. Frosh at the trial denied Mr. Coleman an injunction, and an appeal was taken to the Maryland Court of Special Appeals. Pending the appeal it was established that Mrs. Coleman was no longer pregnant. The Maryland Court of Special Appeals did not make the case moot, but upheld the trial court. An appeal was taken to the Maryland Court of Appeals.

On March 2, 1984, Petitioner/father Chris Allen Fritz filed a Motion to Intervene in *Coleman v. Coleman,* then pending before the Maryland Court of Appeals, to advance other constitutional arguments based on the Thirteenth Amendment on his behalf and on behalf of all fathers of unborn children, and because, among other reasons, ". . . said interests cannot be adequately represented by one father of an unborn child as said father's interests go to that particular child alone and that particular marital relationship and the changing circumstances of one familial situation preclude a full and fair representation of the interests of applicant, his unborn child, and others similary situated." *(See* Appendix B.)

Petitioner Fritz's child had been aborted in an abortion clinic, opened especially in the early morning hours for that purpose, while he sought a judicial hearing. Subsequently, the Maryland Court of Appeals, in *Fritz v. Hagerstown Reproductive Services et al.,* 454 A.2d 846 (1983), ruled that Petitioner Fritz's claim was moot.

Mr. Coleman reconciled with his wife and on March 6, 1984, moved to dismiss his appeal. The appeal was dismissed by the Maryland Court of Appeals on March 6, 1984. Petitioner/father Fritz's Motion to Intervene was then dismissed as moot. *(See* Appendix A.)

Petitioner Fritz filed this writ of certiorari with the court, seeking judicial recognition of a father's constitutional rights in procreation and a father's constitutional rights to protect his child and to the integrity of the marital bond.

ARGUMENT

A. The Thirteenth Amendment Absolutely Supports and Recognizes a Husband's Rights to Protect and Defend the Life of His Unborn Child.

The Thirteenth Amendment forbidding slavery and involuntary servitude was a denunciation of a condition, and reaches every race and every individual. *Hodges v. United States,* 203 U.S. 1 (1906). The Thirteenth Amendment is not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States, and the power vested in Congress to enforce the Thirteenth Amendment by appropriate legislation includes the power to enact laws operating upon the acts of individuals, whether sanctioned by state legislation or not. *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409 (1968).

Accordingly Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation. *Griffin v. Breckenridge,* 403 U.S. 88 (1971); Witherspoon, *Impact of the Abor-*

tion Decisions Upon the Father's Role, 35 The Jurist 32 (1975), at page 60, a model statute for Congressional enactment under the Thirteenth Amendment is shown.

Congress has not yet enacted a statute finding the destruction of fatherhood by a wife having abortion on demand to be a badge or incident of slavery. However, it is submitted that the prohibition of slavery itself in the Constitution is sufficient to preclude a clear instance of abortion on demand in derogation of a father's rights, because the destruction of fatherhood was an "existing state of circumstances" or an "actual condition" of American slavery, not just a badge or incident to it. Now again, the destruction of the rights of fatherhood through abortion on demand is an "existing state of circumstances" or an "actual condition" to which the Thirteenth Amendment is applicable. Therefore, the Thirteenth Amendment automatically protects a father's rights to protect his child before and after birth. The *Civil Rights Cases,* 109 U.S. 320 (1883); *Alma Society, Inc. v. Mellon,* 601 F.2d 1225 (2d Cir. 1979). Legally, only a slave in American slavery would have no such right to protect his child. *(See* authorities cited *infra.)*

In America an "actual condition" of slavery was, in the words of Senator Charles Sumner, a framer of the Thirteenth Amendment, "the denial of the paternal relation." *Congressional Globe,* 37th Cong., 2d Sess., (March 31, 1862) p. 1447.

Representative John A. Bingham of Ohio, the author of the Due Process and Equal Protection Clauses of the Fourteenth Amendment, spoke of the treatment of the father in American slavery as a "blasphemy against the divine beauty of life." *Congressional Globe,* 37th Cong., 2d Sess. (March 12, 1862) p. 1203. For American slavery was not just an economic condition, the drafters of the Thirteenth Amendment recognized, but a system that had ". . . destroyed the sanctity of marriage, and sundered and broken the domestic ties, . . . [and] compelled [the slaves] to submit in silence and labor in tears." *Congressional Globe,* 38th Cong., 1st Sess. (March 31, 1864) p. 1369. They rightly perceived that the

> legal marriage relation establishes personal rights and personal interests which no legislative tribunal under our form of government, nor the parties themselves at their mere will and pleasure, can divest or destroy. The wife owes obedience to the husband and the husband protection to the wife, and both owe protection and care to their children. This relation lies at the very foundation of our whole social system. . . . [L]aw is to protect this relation; to protect the personal rights of husband, wife *and children* that grow out of it.
>
> *Congressional Globe,* 36th Cong., 1st Sess. (April 3, 1860) App. p. 199.

The "actual condition" of American slavery was that this "very foundation of our whole social system" was denied to the human beings who were slaves.

A look at the contemporary case law best sums up the "existing state of circumstances" of the slave, a status the Thirteenth Amendment was to prohibit. In a pro-slavery decision the Georgia Supreme Court in *Bryan v. Walter,* 14 Ga. 185 (1853), at 199, 200, noted that American slavery did not recognize the slave as a person, but as property like "the slavery of the Ancient Republics":

> Their slaves, like ours, had no name, but what their masters gave them. They could take nothing by purchase or descent; they could have no heirs; they could make no will or contract of any kind. The fruits of their labor and industry belonged to their masters. They could neither plead nor be impleaded; and were utterly excluded from all civil concerns. They were incapable of marriage. The laws of adultery did not apply to them. They might be sold or mortgaged. *Partus sequitur ventrem,* was the rule indiscriminately applied to slaves and cattle. *(Dr. Taylor's Elem. Civ. Law,* 429, *and the authorities there cited.)*

The Justice who set forth this "historical" justification for slavery, in his words "keeping pace not only with the ad-

vancing civilization of the age, but with the improved condition of the negro himself . . ." was Chief Justice Lumpkin. Were the decision just, the name would be eloquent and further ennoble a wise and good act. But because there is no poetry in enslaving or murdering a fellow human being, rather than eloquence there is burlesque.

> Lumpkin, *n.* [after Tony Lumpkin, ignorant young man in the comedy, *She Stoops to Conquer* (1773) by Oliver Goldsmith, 1774, Brit. author.] A clumsy often stupid person: a blundering fool.
>
> *Webster's Third New International Dictionary* (1966).

As we live life and feel, we must at times cry. However, even in chains and blood, on occasion we think, and we laugh. Does justice have some hidden angel of irony that dictates that man's most stupid, most callow, and tyrannical judicial usurpations be signed by justices appropriately named?

Contrast Chief Justice Lumpkin's description of American slavery and its total lack of recognition of any paternal relationship with the words of this Court wherein the rights of a father have been referred to as "rights far more precious than property" and as "essential." *Stanley v. Illinois,* 405 U.S. 645, 651 (1972). Unfortunately, the acts of this Court in such decisions as *Planned Parenthood v. Danforth,* 428 U.S. 52 (1976), lessen the meaning of the words of *Stanley.*

The framers and supporters of the Thirteenth Amendment knew the "existing state of circumstances" of slavery and to abolish those "actual conditions" passed the amendment. Senator James Harlan of Iowa, in debates on the Thirteenth Amendment, stated, ". . . according to the matured judgment of these slave states, this guardianship of the parent over his own children, *must be abrogated to secure the perpetuity of slavery.*" B. Schwartz, *Statutory History of the United States: Civil Rights* 72 (1970) (emphasis added). Representative Eban Ingersoll of Illinois in the debate stated, "I am in favor of the adoption of this amendment because it will secure to the oppressed slave his natural and God-given rights. . . . He has a right to the endearments and enjoyment of family ties . . ." *Id.* at 53.

American slavery was more than an economic system of servitude, and a main feature of its "actual condition," not just a badge or incident thereof, was to deny the humanity, personood and fatherhood of the black male.

> In Latin America, the law and the Church provided certain protections for the family life of the Negro slaves. Slaves were free to marry, even against the will of their masters, provided only that they keep serving him as before. They were free to intermarry with free persons, provided only that their slave status not be concealed. Slaves who were married could not be sold apart from each other unless it was guaranteed that they could continue to live together as man and wife. None of these minimum protections of the family were built into the system of slavery in the United States, where slaves were often permitted to marry but only at the discretion of the master. *In the United States, the slave husband was not the head of his household;* the white owner was the head.
>
> A. Billingsley, *Black Families in White America* 60 (1968) (emphasis added).

The Thirteenth Amendment was passed to prohibit this evil and did so automatically.

E. Franklin Frazier, in *The Negro and the United States,* (1957) at 429, observed: "Under slavery, the Negro family was essentially an amorphous group gathered around the mother or some female on the plantation. *The father was a visitor to the household without any legal or recognized status in family relations.*" (Emphasis added.)

Kenneth B. Clark, in *Dark Ghetto: Dilemmas of Social Power* (1965) at 70, wrote:

> Because of the system of slavery in which the Negro male was systematically used as a stud and the Negro female used primarily for purposes of breeding or for the gratification of the white male, the only source of family continuity was through the female, the depend-

> ence of the child on his mother. . . . Psychologically, the Negro male could not support his normal desire for dominance.

Kenneth Stampp, in *The Peculiar Institution: Slavery in the Ante-Bellum South* (1956) at 343, 344, of the slave noted:

> The husband was not the director of an agricultural enterprise; he was not the head of the family, the holder of property, the provider, or the protector. If his wife or child was disrobed and whipped by master or overseer, he stood by in helpless humiliation. . . . In so far as the family did have significance it involved responsibilities which traditionally belonged to women . . . The husband was at most his wife's assistant, her companion, and her sex partner. He was often thought of as her possession ("Mary's Tom"), as was the cabin in which they lived. It was common for a mother and her children to be considered a family without reference to the father.

Now again, fathers are to stand by, helpless while their wives disrobe and their child is "terminated." The self-enforcing protection of the Thirteenth Amendment belongs rightfully to these fathers. Society's failure to recognize these constitutional rights of husbands and fathers, will in time result in the withdrawal of these men from the social contract.

The much cited incidents of violence against abortion facilities already, are most likely from those personally aggrieved. Such is the nature of man. *See The N.O.W./N.A.F. Briefing Book on Abortion Clinic Terrorism* (National Abortion Federation 1984); *see also* Fort Lauderdale News Sun Sentinel, November 16, 1983, wherein a father physically closed down an abortion facility to protect his daughter and save his grandchild. For this he was arrested.

One should not lose sight of the fact that despite the obstacles placed on black men and black families in the American slave system, there were many men as fathers who heroically managed to build bonds and ties even in such a system

of brutalization. *See* H. Gutman, *The Black Family in Slavery and Freedom, 1750-1925* (1976). So also there is this heroism in the abortion culture by fathers and husbands who are as yet unsung. Such too is the nature of man. Humans are not just pawns.
heroism in the abortion culture as fathers and husbands like Chris Allen Fritz demonstrate. Such too is the nature of man. Humans are not just pawns.

That some or many rise above these vicissitudes of life—the purposeful destruction of fatherhood—is no justification for the legal establishment of such policies. The rage of manhood robbed will burst forth in time in those modes of expression common to the male.

Without fatherhood, there can be no humane civilization. Abortion on demand, which ostensibly locates complete authority for the decision to have an abortion in the mother, has the effect of destroying the bond of fatherhood, and the bonds between husband and wife and all society. Men are first "relieved" of any responsibility for their unborn children, then denied any responsibility and finally castigated for being irresponsible and informed that, therefore, they can have no authority concerning their unborn offspring. It is neither wise nor right to further enshrine the action of men who don't want to be fathers by undermining by law the rights of those who do. A new plantation system for males is being legislated by court decisions, such as *Planned Parenthood v. Danforth,* that refuse to recognize a husband's rights as a father.

In *Danforth* this Court struck down a legislative requirement that there be a husband's consent before his wife have an abortion. This was done on the grounds that since the State had no right to prohibit abortion, it could not give such a right to a husband. The clear implication of this reasoning is that the husband has no rights to begin with, but is "invested with rights by the State."

The right of the father to protect his unborn child is based in natural law—a law that a just State is bound to recognize. The notion that only the State creates rights and then gives them to a father to protect his child is erroneous. Such a po-

litical philosophy posits a government answerable to no higher law. If this perspective of total reliance on positivistic law is logically developed and carried out, the people then have reasonable grounds in their relationship to such a government, . . . "to alter or to abolish it, and to institute new Government." *Declaration of Independence.*

That such a course of action would be undertaken, would be an optimistic scenario. Unfortunately, socially it is possible that the fatherless family groupings so evident in much inner city culture across the country, in part as the legacy of American slavery's systematic undermining of fatherhood, may well become the norm for society at large. It would then be a civilization that would fall, rather than a mere government overthrown.

Becoming a father is a process that "includes the development of certain personal qualities, goals, attitudes, self-representations, expectations, roles, object relationships, conflicts and defense mechanisms. For men as well as women, abortion abruptly arrests this process and creates a role vacuum in which confusion, ambivalence, guilt, and hostility abound." Rue, *The Familial Context of Induced Abortion,* in Restoring The Right To Life, The Human Life Amendment 105, 116 (Bopp ed. 1984).

Linda Francke, in *The Ambivalence of Abortion* (1978), noted that men who cared were devastated by the abortion experience. Francke found men to be "silent sufferers bewildered and frustrated by their emotional responses" to abortion. In her view, abortion is a far greater dilemma for men than society has even begun to realize. Francke, *Abortion and Men,* Esquire, Sept. 1978, at 58.

Rue has written,

> While legally the right to advocate future motherhood is guaranteed, the right to insist on future fatherhood is not. This alone is very disturbing and unfair to many men. This societal impotency has for a number of men produced sexual impotency, typified by a feeling of helplessness and hostility.

Rue, *The Familial Context of Induced Abortion,* in Re-

storing the Right To Life, The Human Life Amendment, at 116.

Again the pattern of rage, sometimes internalized, sometimes not, so evident in American slavery and in Watts, is manifest in the American abortion ethos. It cannot continue to be silent, private suffering.

Most relationships do not survive the abortion experience. Milling, *The Men Who Wait,*Woman's Life, April 1975, at 48; L. Francke, *The Ambivalence of Abortion.* There is an inherent logic in this in that if the flowering of the relationship between the man and the woman is killed the relationship itself will die, unless there is redemption. Further, if the mother does not bond to the child she is physically carrying, what sort of bonding can be expected to other human beings?

The social consequences of elevating the privacy rights and procreative rights of the mother over the procreative and familial rights of the father leave no governmental underpinnings for the marital community. The resulting atomization of society promises only selfishness, sadness and self-destruction.

Part of the aim of the Court in manufacturing the "privacy" right for abortion may have been a thought to have a proper bias for females in the law. In reality, what has occurred is a bias against life, human bonds, and female sexuality. If the mother wants the abortion she has it. If the boyfriend, his parents, her husband or her parents want the abortion, in fact, they prevail on the mother to get it, as her very condition makes her vulnerable to coercion or subtle manipulation.

Likewise the human stage is set for misperceptions. A woman does not get pregnant because a man judiciously pointed out to her that it was her body under *Roe* to do with as she saw fit. He is there with promises or statements of intent, implied or expressed. When she, pregnant, then turns to him and he says—out of selfishness or his own fears of advancing commitment—"It is your body, it is your decision," she hears, and indeed he has said in part, "You aren't all that important to me." There we have the crowning prin-

ciple of our so-called progress—every woman is an island. She need not concern herself for whom the bell tolls. It is not tolling for her. Like the song says, "Freedom's just another word for nothing left to lose."

> He [the father] should have no right, of course, to force the woman to have the abortion; but if he is willing to share the financial responsibility of an abortion and the woman refuses to have one, then he should not be forced to support the child.
>
> Karen DeCrow, *Sexist Justice* 230 (1974).

Ms. DeCrow was a lawyer board member of the National Organization of Women.

Structures are built in the law to protect us and to enable us to reach out. The very use of the choice module in the context of pregnancy is destructive. Should such a "choice" option be used as to shoplifting, drunk driving or heroin use? Would it? The bias against life in the *Abortion Cases* provides no societal support for bonding. The UCC gives commerical transactions a backdrop for a trust that is necessary to do business. Present abortion policy as set by this Court gives no such backdrop for husbands and wives to do life. Bonding should be encouraged and fostered.

> Since pregnancy is a chain of causation jointly launched, a joint decision should be required to sever it legally. As a result, mothers would remain free of a father's suit to compel abortion just as fathers would be free of a unilateral maternal power of life-and-death over a father's offspring.
>
> Swan, *Abortion on Maternal Demand: Paternal Support Liability Implications,* 9 Valparaiso Univ. L. Rev. 243, 271 (Winter 1975).

The marriage contract is a social relationship by which the parties surrender what otherwise might be their individual prerogatives, and there is nothing offensive to the common conception in the notion that the children whom the parties

conceive by mutual action will not be denied life support by either before or after birth. "Every contract binds; to bind, to restrain, is its very essence." *Chicago Board of Trade Co. v. United States,* 246 U.S. 231 (1918) (Brandeis, J.) *See* M. Glendon, *The New Family and The New Property* (1981) for an analysis of the steady eroding in the law of personal, familial bonds and a concomitant increase in the social supports for non-familial, economic connections. The withdrawal of societal support for fatherhood fulfills Charles Peguy's prophetic observation that fathers would be "the true revolutionaries of the twentieth century."

It is in the nature of a public lie that finally it be destroyed—the slave trade and American slavery are ready examples. Though for great lengths of time—centuries—the press and government and law and good order and popular theology all conspired to prop up a deceitful despotism, still it fell. Wilberforce is remembered, but those who quoted law and rights and freedom of choice for the slavers are gone, and who knows their name except in shame? So too it will be with abortion advocates or abortion libertarians—for there is no poetry in killing the child, in breaking the bond, in severing husband and wife, father and child. It is Bethlehem, not Babylon, that has captured our mind and heart and soul. America too will return from Egypt, and the word will come that they who sought to kill the child are gone.

In the sweep of time, that which is enduring is often found in dissent while majorities are consigned to dust. Thus, the first Harlan in *Plessy* captures the eternal: "Our Constitution is color-blind." Who coined "separate but equal"? So too, for bedrock truth in the abortion ethos, the judicial dissenters again provide that which will last.

> But the father has rights. They are familial. They antedate the Constitution; they are about as old as civilization itself. They center in a main potentiality of his marriage: the birth and raising of children. Few human experiences have meaning comparable to parenthood. The father's rights asserted here are surely among the fundamental rights protected by the Constitution.

Doe v. Doe, 314 N.E.2d 128, 134 (Mass. 1974) (Hennessey, J. dissenting).

B. Did Roe v. Wade and Doe v. Bolton Mandate That a Mother Has "an Absolute Constitutional Right to an Abortion on Demand"?

In *Coleman v. Coleman,* 471 A.2d at 1119, in the Court of Special Appeals of Maryland, Chief Justice Gilbert states,

> Undoubtedly, "abortion on demand" was not mandated by the Supreme Court. That august body made that pellucid in *Roe v. Wade,* 410 U.S. at 163, and in *Doe v. Bolton,* 410 U.S. at 189. Both of those cases make crystalline, however, that a woman in the first trimester of pregnancy, in consultation with her physician, may elect to terminate pregnancy, and neither the State nor the woman's spouse nor the father of the child has any right to intervene so as to prevent her decision from becoming fact. *City of Akron v. Akron Center for Reproductive Health, Inc.,* 103 S.Ct. at 2492.

Now what exactly does that mean? How, in the name of logic, truth, or an idle candor, can courts or judges continue to state that there is not "abortion on demand" in America since *Roe?*

Chief Justice Gilbert speaks again at page 1120:

> Although a woman may not be constitutionally entitled to an "abortion on demand," she is most definitely entitled, as a matter of right, to a medically induced abortion during the first trimester, notwithstanding the objections of the State or any other person, firm, corporation or association.

The first clause gives and the second clause takes away.

Chief Justice Burger indicated in the original *Roe* opinion the Court did not enact "abortion on demand." In his view that no doubt was true. But it is necessary at this time that a clear statement be made by the Court, as the abortion legis-

lature of this country, exactly what was done, since in fact there is abortion on demand. In this instant case the record shows *that there was no reason* for the abortion other than the demand of the mother.

It appears that judges and courts recognize that abortion is not a "good," and therefore recoil instinctively from the phrase "abortion on demand" in an attempt to deny and rationalize what is being done. If this interpretation is not true, then *what are the limits* on this legal right to demand death? *See Akron v. Akron Center for Reproductive Health,* Inc., __U.S.__ 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983); *Bellotti v. Baird* (II), 443 U.S. 622 (1979); *Colautti v. Franklin,* 439 U.S. 379 (1979); *Bellotti v. Baird* (I), 428 U.S. 132 (1976); *Planned Parenthood v. Danforth,* 428 U.S. 52 (1967); *Floyd v. Anders,* 440 F. Supp. 535 (DS. S.C. 1977).

C. What are the Standards for Mootness in Abortion Litigation Where the Subject Matter is Always "Capable of Recurring, Yet Evading Judicial Review" and the Court Has Returned to "Substantive Due Process" Concepts?

Roe v. Wade, 410 U.S. at 515, establishes that a pregnancy completed by birth or ended by abortion does not render an abortion case moot. *See also United States Parole Commission v. Geraughty,* 445 U.S. 388 (1980); *Moore v. Oglivie,* 394 U.S. 814 (1969); *Southern Pacific Terminal Co. v. ICC,* 219 U.S. 498 (1911).

In *Scheinberg v. Smith,* 659 F.2d 476 (5th Cir. 1981), at 484, the court states concerning abortion litigation and review of legislative responses, "This is surely a troubling journey into the realm of substantive due process, yet we can discern no alternative, given the present state of our jurisprudence." Whether this Court is to be viewed as a "superlegislature," *Ferguson v. Skrupa,* 372 U.S. 726, 731-732 (1963), "Platonic Guardians," *Plyer v. Doe,* 457 U.S. 202, 210 (Burger, C.J., dissenting), or "an ex officio medical board," *Danforth,* 428 U.S. at 96 (White, J., concurring in part and dissenting in part), the point is that, as the continuing nega-

tive experience of abortion on demand mounts throughout the country, the issue must again and again be brought to *the Court, to Congress, to the Executive to be set right.* At this point in the ongoing legislative re-evaluation of the situation, a sudden rediscovery of discretion as a judicial virtue is inappropriate, and truly not virtuous.

Accordingly, Chris Allen Fritz prays on his behalf, and the behalf of all fathers similarly situated, not to be mooted. For mute, they cannot remain.

Conclusion

This Petition should be granted and the question of a father's constitutional rights to protect his child unborn be given full consideration.

Dated: May 31, 1984

Respectfully submitted,

CHARLES E. RICE
(Counsel of Record)
Notre Dame Law School
University of Notre Dame
Notre Dame, Indiana 46556
(219) 239-5667

THOMAS PATRICK MONAGHAN
Catholic League for Religious
and Civil Rights
1100 West Wells Street
Milwaukee, Wisconsin 53233
(414) 289-0170

Attorneys for Chris Allen Fritz

APPENDIX

APPENDIX A

DONALD PAUL COLEMAN	*	IN THE
	*	COURT OF APPEALS
	*	OF MARYLAND
v.	*	
	*	Petition Docket No. 722
	*	September Term, 1983
CONSTANCE JEAN COLEMAN	*	
	*	

* * * * *

O R D E R

The Court having considered the petition for a writ of certiorari and the dismissals of the petition filed by the petitioner and his attorney, it is this 6th day of March, 1984

ORDERED, by the Court of Appeals of Maryland, that the motion to intervene filed by Chris Allen Fritz be, and it is hereby, denied on the ground that the voluntary dismissal of the petition renders moot the aforegoing motion.

/s/ Robert C. Murphy
Chief Judge

APPENDIX B

IN THE CIRCUIT COURT
FOR MONTGOMERY COUNTY, MARYLAND

DONALD PAUL COLEMAN, *

Appellant, *

Misc. No. 722

vs. *

Sept. Term, 1983

CONSTANCE JEAN COLEMAN, *

Appellee. *

MOTION TO INTERVENE

NOW COMES Chris Allen Fritz, by and through his attorneys, Daniel J. Bartolini and Patrick Monaghan, and moves this Honorable Court to enter an Order granting your applicant leave to intervene pursuant to Maryland Rule 208 and the United States Constitution and as reasons therefor says:

1. The applicant is the father of an unborn child who was aborted under Maryland and federal law pursuant to an interpretation of *Roe v. Wade* and its progeny.

2. Applicant sought relief in equity in the courts of Maryland on state and federal constitutional grounds (see *Hagerstown Reproductive Health Services v. Fritz,* 295 Md. 268, 454 A.2d 846 (1983)) and was ultimately denied such relief on the basis that his claim was moot because his wife had been rushed to an abortion in the early morning hours during a period of time in which there was a gap in the injunctive legal protection of the unborn child.

3. That the representation of his interest as an applicant for intervention by the existing parties is or may be inadequate and as an applicant is or may be bound by a judgment in this action.

4. That he has reconciled with his wife, Bonny Fritz, and they are living together as man and wife and are actively planning to have children, although Bonny Fritz is unable to become pregnant at the present time.

5. That subsequent to the abortion, applicant's wife has deeply regretted said decision and the manner in which she was legally rushed into making such a decision with an abortion clinic being specially opened for the purpose of aborting applicant's unborn child at 6 a.m. and applicant has suffered subsequent damages to the marital relationship brought about by sterility and guilt.

6. That applicant's particular case was subsequently dismissed for mootness and applicant was unable to pursue legal and equitable relief for purposes of establishing a principle of protection for himself and other fathers and mothers similarly situated.

7. That though the Appellant in the above entitled case, Donald Paul Coleman, is advocating the interests of married fathers of unborn children and in such representation has been able to have the court rule and dismiss suggestions of mootness even though the unborn Coleman child has either been a victim of an abortion or miscarriage, the applicant still desires to advocate and advance the interests of all fathers and mothers of unborn children as a class, in particular as said interests cannot be adequately represented by one father of an unborn child as said father's interest go to that particular child alone and that particular marriage relationship and the changing circumstances of one familial situation preclude a full and fair representation of applicant, his unborn child, and others similarly situated.

8. That in the event that his wife should have her doubts about a future pregnancy and seek yet another abortion, he, as her husband and as the protector of their to-be-conceived unborn children wishes to have his rights adjudicated by this Honorable Court so that he may act swiftly and promptly in the event that this Court is to find that he has rights to do so in order to preclude an abortion of any future unborn child to be born to him and his wife, Bonny Fritz.

9. That his wife was not properly and fully counseled

about the risks and side effects of an abortion, including the fact that it could impair her ability to conceive in the future and increase her chance of miscarriage or premature delivery and as a result of the failure to so adequately advise and inform his wife, he feels that he and his wife are presently experiencing just this failure-to-conceive problem since she has never experienced difficulty with conception in the past and they have one child by their marriage, who was approximately one year old at the time the litigation began between him and his wife in the previous case.

10. That applicant adopts Appellant's brief in the Court of Special Appeals, September Term, 1983, Misc. No. 38, and incorporates it by reference herein, a copy of said brief is attached hereto.

11. That he wishes this matter fairly adjudicated on behalf of himself and on behalf of all fathers who are now or may be in the future similarly situated in their need to take up for, protect, and defend the right of their wives to adequate counseling under § 20-208 of the Health General Article and the right of their unborn child to be born under the Ninth and Thirteenth Amendments of the United States Constitution.

Respectfully submitted,

/s/ Chris Fritz
Applicant

/s/ Daniel J. Bartolini
Attorney for Applicant
326 St. Paul Place
Baltimore, MD 21202
Telephone: (301) 752-1230

/s/ Patrick Monaghan
Attorney for Applicant
1100 West Wells St., 501A
Milwaukee, Wisconsin 53233
Telephone: (414) 289-0170

APPENDIX C

Testimony of Dr. Jerome Lejeune and Dr. Bernard Nathanson from the Trial Record, pages 56-83.

IN THE CIRCUIT COURT
FOR MONTGOMERY COUNTY, MARYLAND

DONALD PAUL COLEMAN,	)	
Plaintiff,	)	
VS.	)	Equity No. 87107
CONSTANCE JEAN COLEMAN,	)	
Defendant.	)	

HEARING ON PETITION

Rockville, Maryland January 13, 1984

BEFORE: THE HONORABLE STANLEY B. FROSH, JUDGE

APPEARANCES:

On Behalf of the Plaintiff:

MARTIN PALMER, ESQ.

On Behalf of the Defendant:

CONSTANCE JEAN COLEMAN, PRO SE

JEROME LEJEUNE, M.D.

was called as a witness and, first having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. PALMER:

Q Doctor, state your name and address for His Honor, please.

A Monsieur le President, my name is Jerome Lejeune. I am Professor of Fundamental Genetics in the Faculty of Medicine of Paris.

Q And what is your profession, Doctor?

A My profession is as a pediatrician. I began as a pediatrician and I got my scientific degree at the Sorbonne in genetics, and I was interested essentially in human genetics, and essentially in disabled children, and especially those suffering a disease called Mongolism.

My studies were in the Faculty of Medicine in Paris. My residency was in a city hospital 60 kilometers south of Paris, which is Etang, and then I specialized as Professor of Fundamental Genetic Science since 1964. I was elected to the first chair of Fundamental Genetics in France, in Paris.

I must add that I have been, for ten years, purely a research worker in the scientific research, Centre National de la Recherche Scientifique in Paris, before I got appointed a professor in the Faculty of Medicine.

Q Doctor, in this country, of course, you would be first of all an M.D., and then we would go on to internship. You have expressed—in Paris, and in a specialty, so you are known then to specialize in what field, genetics?

A I am in genetics, and it happened that I discovered the first chromosomal disease in man, which is an extra chromosome in Down's Syndrome, Mongolism, and from that point a new field of research was opened in human genetics and it helped to clarify not only the causes of that disease but to

understand the basis of the human nature, because it demonstrated that all the genetic information is carried inside the chromosome, also in our species, and that genetic information is what makes the nature of every one of us so that each one is different from the next one.

Q Doctor, if I may briefly, to finish your qualifications, please don't be modest because this Court needs to hear it. They need to know.

You mentioned the extra chromosome. Did you receive any honor for that, and please tell us any other honors or awards that you have received, and any professional or international societies that you are a member of.

A Excuse me, Your Honor. I don't do that really, habitually. I had the honor of receiving the first Kennedy award from President Kennedy in this country for the discovery of the extra chromosome in—and for the other discovery I made in human chromosomes I received, also in this country, the William Allen Memorial Medal which is the highest prize you can get in genetics in the world.

I was elected a member of the American Academy of Arts and Sciences, and in other countries I have received various awards and am a member of the Swedish Academy of Science, the Italian Academy of Science, the British Society of Medicine, the Argentinian, the Danish and the other things like that, a member of the Pontifical Academy of Science. That is essentially due to the type of work that I did on the structure of the genetic information which makes the difference between human beings and non-human beings.

And it is because of that, that I have—I have other awards in Paris and in France, but I am a member of the Acadamie de Science Morale et Politique, the French Academy in Paris.

Q Then, any other professional associations that we should know about, Doctor, or did there come a time that you taught in this nation, and can you tell us the circumstances under which you were a professor here?

A I had been teaching a course of human genetics at the

California Institute of Technology, Caltech. It was in '58. It was the year after I did the discovery about the chromosomes, but that was not yet made. And the president of Caltech asked me to come and to give the first course in human genetics at Caltech. I must confess that my English is rough, but it was much rougher at that time, and my students learned a little of human genetics. I learned English that way.

THE COURT: Most of us would be quite satisfied and happy to deal with a second language as you deal with English.

THE WITNESS: Thank you, Your Honor.

BY MR. PALMER:

Q Doctor, I show you what has been marked as Plaintiff's Exhibit 1, and ask you if you can identify that for us, please.

A Yes. This statement was published. I don't know exactly the name, but the official papers of the U.S. Senate because I had the honor to testify on a commission about what we know of the scientific determination of what makes a human being, and I had the honor to speak before the Senate, and that is the right paper.

Q Can you tell us what No. 2 is?

A This paper is a little different. It speaks essentially on the in vitro fertilization because it has changed—it has increased, not changed. It has increased very much our knowledge of the early human being, and this paper was written for the British government who has a special committee to investigate what in vitro fertilization would mean from the legal point of view, whether they had to make a new law about it, so they wanted to know the science, and I was asked to write down this statement which is seven pages.

Q Doctor, have you published any other papers or publications?

A Yes, sure.

Q How many?

A I don't know exactly. Around 400 papers in scientific newspapers.

Q And they are primarily in what areas?

A Essentially in human genetics, that is, the fundamentals which makes you healthy or unhealthy, and which makes a difference between a chimpanzee and a man, a gorilla and a chimpanzee, which allows us to understand how some diseases prevent the complete blossoming of our human nature.

MR. PALMER: If Your Honor has any other questions, I would ask the Court to accept Dr. Lejeune as an expert witness.

THE COURT: I certainly will accept him as an expert.

BY MR. PALMER:

Q Doctor, based upon what you have heard here this morning, and assuming the six-week gestation, approximately, of this preborn child, have you had an opinion as to whether or not this child is a person, a human being as we understand the term, and whether or not this child, for His Honor's consideration, would be deemed in France to be viable, and if so, can you explain for His Honor your answer.

A Well, I would say very simply, Your Honor, that at six weeks of age we are very tiny creatures. But those tiny creatures we are—or we have been, I should say—are truly a member of our species. That is, we know from especially the study of the chromosome, the information which is carried through the chromosome, that at the very moment that 23 chromosomes from the mother, coming from the ovule, are fecundated by the 23 chromosomes carried by—

Q If I may interrupt you, Doctor, "fecundated" means—

A Oh, excuse me. I used the French term. I should say

fertilized, excuse me. Difficulty of the language.

When it has been fertilized by the 23 chromosomes carried by the sperm, we know from scientific evidence that all the information necessary and sufficient to determine all the qualities of this very person is already spelled out. That is very akin to the definition of a constitution, by a lawyer, because the table of the laws are written in a very tiny scripture which we call the genes, inside the molecule we call the DNA, and the whole thing is coiled a little like the magnetic tape in a mini-cassette, and the coiling makes that this long thread is now visible under the microscope, and we call it a chromosome.

But we know that the spelling of every information which will tell—you will have brown eyes, you will have blond hair, you will grow that high if no disease until then, you will live that long if no accident intervenes—is all spelled out there in full terms, just exactly the same as the full constitution of a country and the full exercise of it is spelled out in the laws of this country.

Now, to come back to the very early beginning, it is, I would say, a constant miracle for the scientist that it could all work, because we know that every information which is necessary to build not only the body but our brain, our brain who is able to understand part of the universe, and even calculate how to go to planets and put a foot on the planets, this brain is at the very beginning reduced—at its true information, it is reduced to the simplest expression of the mathematicians, that is, all the necessary information to have it building himself. And as we know, nothing is coming in as an information to the fertilized egg after fertilization. Then, everything must be there.

Now, for long, all those data were taken from pathology on one hand and general knowledge of biology on the other hand, in simple plants and animals, but with new developments of science we know more and directly on our own species.

For example, we know that it is possible to take a ripe ovum, to put it in petri dishes, and to have the sperm put on those petri dishes totally outside the mother's body. That is

the so-called in vitro fertilization.

With that, we have the proof that we can monitor the entry of the sperm on the egg in the microscope to see that the new being is beginning to split himself into organized cells very rapidly. We have finished this fertilization in around four to six days. And at that moment we have the demonstration that the early human being is fully viable outside the womb. It just needs a fluid, a very simple fluid but the correct fluid, and some heat and some protection for radiation. It could not be exposed to radiation of the sun directly, for example. It has to be in shadow, in good temperature.

After that, the viability of the early human being has been, I must say, a surprise for the geneticist and for the biologist, because we did not know with certainty that its viability was that profound and that deep. For example, in animals it has not been made—actually in man I would not recommend to do it but there have been attempts to do it, but I guess we have to respect more human beings, not playing with them—but it has been done, for example with a cow, with cattle. It is possible to have a cattle being fertilized in vitro and to ship it away, for example from France to the United States. Now, the tiny cattle being is around one millimeter and a half in size, and to ship him normally would require to have a cow and to ship the tiny cattle being inside the cow. But what you can do, which was the great surprise that was feasible, was put that cattle being inside the Fallopian tube of a rabbit female—the rabbit is a very small animal as compared to a cattle—and to put ten or twenty of those tiny embryos inside the Fallopian tube of the rabbit, to send the rabbit by air mail to the United States, for example—it has been done especially between France and the United States—and to recuperate the tiny cattle and to put them one by one into a recipient female cattle and get normal French calves from American cattle around nine months later.

And the demonstration is that the cattle resulting from such a process have all the qualities of the parents who donated the ovum and the sperm, and they have none of the qualities of the carrier mother, the recipient cattle, and it

has none of the peculiarities of the in-between recipient, the container which was the female rabbit.

So that, we have the proof in animals that their very nature is entirely dictated after fertilization has taken place, to be that very type, and that very individual cattle with those specifications and not the others. The other surprise has been that the drive to life of the early human being is that strong, that he can suffer mistreatments that we could not believe possible. For example, you can freeze an early embryo of a mouse, and freeze it very deep, on the low temperature of the liquid nitrogen, very close to the absolute zero. And we can keep it in the deep freeze for months, years. And if you thaw it very kindly—you have to be careful doing that—you can have it back and implant it in a recipient mouse and it will develop into the very tiny mouse being that it was from the very beginning.

So that, we can even suspend time because when we slow down the temperature, what we do is just to suspend the time, and then the cell is like sleeping that deep, that it is not destroyed, and nothing is destroyed. So that, if it has again the fluids and the temperature, it will develop again. It is already there.

In fact, if in vitro fertilization is possible in our species, it is because normal fertilization does appear that way. Normally the ovum is expelled from the ovary and it is taken by the Fallopian tubes and then it floats freely in a kind of liquid which is inside the Fallopian tube. And the encounter between the sperm and the ovum is normally inside that tube of flesh. But, when we have a test tube baby, the tube is of glass but is the same thing, that the two cells, the ovum and the sperm are floating freely.

And it is because all of us have been conceived that way inside the Fallopian tube, that test tube babies are so possible. The only change is that the tube of flesh, which is a normal fertilization process in our species, is replaced by a tube of glass. But otherwise, the development is the same.

Now, curiously—and that is an extraordinary impression of the striving to life of the early human being—even implantation inside the womb is not necessary, even in our spe-

cies. For example, it can happen that by accident, that the early embryo anchored itself inside the Fallopian tube instead of reaching the uterus. And it can develop very easily there, and very normally. It produces its tiny placenta, it hooks on the walls of the Fallopian tube, and it develops perfectly well for the first two months of the pregnancy. But after two months of pregnancy the size of the baby is increasing and the Fallopian tube is a tiny tube, and it is not very extensive, and then you risk a rupture, an hemorrhage, and it can kill the mother and the baby, indeed. That is the reason why a tubal pregnancy is so dangerous, an urgency in medicine.

But, the phenomenon is that the baby, who has never been inside the womb, is perfectly normal at the moment he is separated.

Now, we know more than that, which is, instead of going inside the Fallopian tube, the early being, the fertilized egg, falls down inside the peritoneal cavity instead of being activated by the Fallopian tube. And in rare cases it can attach itself on the walls of the intestine, of the ovary, that is entirely outside the womb, and develop to term.

Now, those cases are very rare, but we know recently, one baby was born in North America, in Canada, and another baby was born in England, just like her, and those two babies are perfectly normal. They have developed entirely during nine months inside the peritoneal cavity of the mother. They have never been inside the womb, and they have managed to put their placenta well enough on the vessels of the bowel of the mother, on the ovary, so that they would get the fluid.

That is very important because it demonstrates that—well, I must be clear that at the end of the process, suddenly the mother recognizes that she is pregnant and you have to make a laparotomy to open the walls, otherwise the baby cannot go out because there is no way for him to go out. And it is the reason why a womb has been invented, the way out of the womb by natural process. In the case of extragenital pregnancy you need to open the wall of the abdomen and to remove the baby, and the baby and mother survived en-

tirely well in those two cases, at least.

It is a dangerous thing, but it proves that even the baby does not need to live in the womb. What he needs only is a supply of fluids, and normally he anchors himself inside the womb but if he can anchor himself on any other human, living tissue, he can survive just as well because it is not the womb which produced the baby, no more than the space shuttle is producing an astronaut. It is, in fact, giving shelter to it. But if you give an artificial shelter like the peritoneal cavity, then the baby manages to do the whole thing which is necessary for him. Because all the envelope that we call the amniotic bag, which we swim inside the amniotic fluid, all that is made by the baby himself. The placenta to anchor itself is made by the baby itself. It is not made by the mother herself.

So that, we know that from the very beginning, he is a perfect human being. It is a being because it exists by its own virtue. It is a human because if you were looking at its chromosomes, and if I were showing the chromosomes to one of my students, if my student could not tell that is a baby, and that is a monkey baby and that is a gorilla baby, if he could not make the difference between a human baby and a gorilla baby, he would fail his examination. It is that simple.

Now, we have to realize that the development of the early human being is quite explosive. From the moment of fertilization, I would say of conception because you have all the concepts which will allow him to be constructed, from that moment he measures, at that moment, around one millimeter, one millimeter and a half.

One month later he has grown all the surroundings, all this bag, all his space suit, so to speak, so he can hook on mother and have the fluid, and measures at one month, four weeks, he measures around three millimeters and a half of length, but his heart already has been beating for one week, because the heart begins to beat at three weeks after conception.

And since that time, from four weeks to eight weeks, it will continue the growing of the members, that is, the hands, the feet, and finish the brain. At eight weeks, that is, two months of age, we know that everything is finished in the sense that

nobody, having never seen any tiny creature, would mistake it if comparing a human baby to a chimpanzee baby. At two months of age no mistake is possible for anybody, just looking at it. It has its fingers, its toes, its flexion in the hands, and if I was a palmist I could tell the good adventure at two months of age. I am not a palmist.

And if we were looking very carefully with a microscope, because the guy is very tiny, at two months of age it is two centimeters and a half. It is half my thumb's length from the crown to the rump. And it would fit very nicely in a nutshell. And if I had it in my fist, you could not notice that I have a human being inside of my fist. But if I was opening it, you would notice that the tiny human being is totally there. You could even read, with a good magnifier, the tiny ridges of the tiny hands of this tiny creature, and with a good microscope you could detect the palm prints, the fingerprints which will never change during the whole life. They are always there. You cannot see them with the naked eye. You have to look very precisely to see the little openings of the sweating glands which already will never change during all the rest of the life.

And already he has the sensitivity. I speak about the baby of eight weeks. It can feel. If with a hair we are just touching its upper lip, it is already able to remove itself because it is an aggression and he is afraid of it. I say afraid—I don't know what he is feeling, but at least he feels it and it retreats from it.

Now, it was a surprise, rather recent—recent, it is five years that it is in use—imagery of ultrasound, that we could see the baby jumping in utero long before the mother can feel it. At two months of age it plays trampoline, but it is that size and the amniotic bag is that size, so that it has room in it and it goes up and it goes down and he plays there. And with sonic vision we can see that very easily.

The first movements recorded as far as I know—maybe I am wrong because we developed very rapidly in this field because first, dance has been found at eleven weeks. We know he dances, and we have photography at eight weeks. Now, the first movement that can be detected—now the

dancing has been photographed at 11 weeks. It has been shown at eight weeks. And the first movements are—maybe a better specialist should say the last word because those refinements of the technique show that surely around the first month, that is four weeks, the beginning of the movement is already there, but it is very difficult to see because the being is very tiny.

So that, my testimony is very simple, Your Honor. From the scientific point of view, we know that the viability of the fetus is there just after fecundation, for the rest of his life, if he is not prevented to continue, he is good. And I would say, to try to make myself clear, that inside this tiny time capsule—not a space capsule but time capsule, the one he has built at around two weeks and a half in his life, that he has built, is now there. He is as independent and viable as an astronaut is on the moon. That is, he has everything to live by himself, but he has to receive the vital fluids from the mother ship.

When you have an astronaut on the moon, and if you open his space suit, he will die immediately on the moon. But nobody believes that an astronaut is not viable on the moon. We believe he is viable provided we give him the vital fluids which are given by the mother ship.

Now, it is the same thing in the beginning of human life, that we have to receive the shelter, the fluids, and the temperature from the body of our mother, but it is not the mother who makes a baby. The pregnant mother has already made the baby. The baby is already there. She is just protecting him, and this protection is the most important because in the actual state of affairs we could not afford artificially this protection to the baby; that is, we cannot have baby grow in vitro for a long time. After eight days at most after fertilization in vitro, the baby must be replaced inside a womb because our systems are not good enough to feed him.

But someday, it will be eventually possible to give the fluids, the special fluid supply to the baby, and then the baby will grow entirely in vitro. It has been told by Aldous Huxley in Brave New World, but it is not possible, not feasible actually. But if it was feasible, and in lower animals it

will probably be feasible rather in the close future, that would demonstrate then without a doubt that if a bottle of mice, so to speak, was made, if the bottle were saying, this baby is mine, nobody would believe the bottle.

That would be the demonstration that the mouse being was a mouse being from its very beginning, and the same is true with all of us. And Your Honor, I am talking too much but I wanted to tell you what I feel about that.

I took the liberty, when I spoke to the Senate, to speak about the fairy tale of Tom Thumb, which is told in every country of the world, which is told in every language, and by different stories and obviously by a common experience. That is, that a long time before we invented sonars and X-rays and all genetics and biochemistry, that women had known that at the beginning, in the womb, there are very tiny human beings, that they are looking like human beings, that they are really human beings. And that's the reason why they invented this extraordinary story of tiny humans, smaller than the thumb, who are living in an underground country with a special feeling in which marvelous things are happening.

And if this fairy tale has been so much in every subconscious of every nation, it is because it is not a fairy tale. It is a tale of truth, that each of us has been during this early period of development, a kind of tiny Tom Thumb living in a vaulted shelter which is the womb, with a reddish light because the baby can already at eight weeks see the light through the wall, a very dim red light, and is dancing there. And he has the capabilities of hearing. And he hears two sounds. One is the racing, hammering of the mother's heart which beats at 60 beats a minute, around, and the other is the very rapid cadence of his own heart which runs at around 140 per minute. And curiously, those two tempos are the tempos of the contrebass for the rhythm of the normal adult heart, and the tempo of the maracas which is the tempo of the fetus. And it is not by chance that you find those two tempos in every pop music, in every primitive music, because that primitive music all of us have heard when we were in very young, in utero. That was our own heart and the

heart of our mother.

So that, it is very moving for the scientist that I am, to observe that the artists have rediscovered all that story that is the few months that we have lived inside of our mother, is in fact a symphony between two hearts beating together. That is the reason why, as a geneticist, I feel that those two hearts should beat together and not one of them be departed from the other.

Q Doctor, if I may, I didn't want to interrupt you.

I am showing you what has been marked as Plaintiff's Exhibit No. 3. This is a magazine, of course, that is published in our nation called Life Magazine, and it was the November '82 edition, a little over a year ago. And the cover story was called, "Test Tube Baby Boom. Elizabeth Kerr, America's First In Vitro Baby, at the Lab Where She Was Conceived."

Is this what you were speaking of?

A Yes, exactly.

Q What is this, if you can tell us, that she is holding in her hand?

A Well, I guess it is the petri dish from where she has grown. That is so simple, and it does not hurt my personal common sense, because I know that all of us have begun that way, that when we speak about topology, the inside of the Fallopian tube is outside the female body because the Fallopian tube opens in the uterus, and the uterus in the vagina, and the vagina in the outer air. And that is very necessary, to have the way out for the baby.

And then, fecundation in vitro is just doing the process as it is occurring in nature, but normally—

Q Doctor, this photograph that appears on page 47, it is entitled, "Twelve hours later the fertilized egg begins to rearrange itself." Now, that doesn't mean much to me except for my old science books, but does that fairly and accurately represent what a 12-hour conceptus looks like?

A Yes, it is a good picture, nothing—

MR. PALMER: We would move to introduce these—

THE WITNESS: But we are not giving a course of genetics, Your Honor. There is a stage before that one in which there are only three cells, and that is a very odd number, very interesting. The eggs split in two, and then it is supposed to split in two and two and two again. But it does not do that thing. It split in two, and then one of the two cells splits again in three. And we know from experiments that the individuality is building itself out of three cell lines, so that we know that in its plastic bag, which is the—the early individual is building his individuality just a few hours after the entry of the sperm.

So, the whole thing is extraordinarily intricate and extraordinarily rapid.

Q If I may, Doctor, I have asked Dr. Carlton to put on the three slides that he had, which I think we discussed and you can tell us what they are. Although they belong to Dr. Carlton and you have not seen them, but—if they would lower the screen for us.

We are talking of modern advances, and coming from Hagerstown, I feel like I am in the space age right here. We have to go in the closet and get a screen. It disappeared.

If you will tell us first, Bill—

THE COURT: Will you identify the speaker for the record.

MR. PALMER: Identify yourself, just for the record, Doctor.

DR. CARLTON: William F. Carlton, Jr. I am an obstetrician and gynecologist here in the county and I am on staff at Holy Cross Hospital.

MR. PALMER: Dr. Lejeune has not seen this slide before, has he?

DR. CARLTON: Not this particular slide. He might have

seen this picture before.

MR. PALMER: What is that supposed to be, Dr. Carlton?

DR. CARLTON: This is the product—I think Dr. Lejeune in his testimony alluded to fertilization occurring in the Fallopian tubes, not always progressing down the tubes to the womb but sometimes going out the end of the tube, and that is the specimen that you see here. This was an ectopic pregnancy, six menstrual weeks along, four weeks along as far as the development of this being is concerned. It passed out the end of the tube in what we call a tubal abortion, and the surgeon handed this off to the anesthetist who held it up, and took a picture because he saw the baby moving and saw the heartbeat functioning.

MR. PALMER: So, then you are saying this is four weeks gestation, or two weeks younger than the baby Coleman at the present?

DR. CARLTON: I believe that is correct, if I understand Mrs. Coleman's—

BY MR. PALMER:

Q Dr. Lejeune, does this fairly and accurately represent a four week old preborn child?

A I would guess so. I would say there is no—that is exactly what it looks like.

Q Doctor, you indicated in your testimony, the heart has been beating from three weeks, is that correct?

A Well, I said that the heart is beating after 21 days; 21 days after conception, the heart is beating. As I said, in a baby four weeks old, the heart has been beating since one week.

Q All right.

A If you speak about six weeks, it has been beating for three weeks. The first three weeks—the heart is built so that it beats correctly at the end of the third week.

Q Doctor, you indicated in your testimony that viability has been a surprise. Has this been a recent surprise, since 1972 which is Roe v. Wade—has this surprise of viability come along as a recent development in medical science in the last ten years or five years, or what period of time?

A Well, I would say it is very recent. It is in the last ten years. We were not suspecting that the early human being could survive so much mistreatment, that strongly. We were supposing that the early human being was extremely fragile and that he could die of any mistreatment, and that is not the case, and that was the surprise. That surprise came directly from the discovery, we were surprised to find that nature was that strong in its drive to life, that even a very tiny human being can resist the difficulties. That is where the surprise was.

Q Doctor, you used in your testimony the phrase, "like a little astronaut in his space suit," and I must say when I first read your testimony before the Senate, that helped me understand medicine. I could picture that.

Is this what you mean by—

A Well, it is exactly that, with the exception, that is, the baby is dead in this picture because the placenta has been removed from the tube. And if you were looking at the same baby that was alive, you would see two things different, that the amniotic bag is quite perfectly spherical, it is under tension, that it moves a little with the beating of the heart of the mother because it receives the impulses of the beating of the heart of the mother through the placenta and the heart of the baby itself is beating at its own speed. And the color is different, it is more alive, and the baby is moving.

Otherwise, I would say this gives a good impression of the morphology. It does not give a good impression of the life, because unfortunately this baby was already dead when the picture was taken.

Q Now, Dr. Carlton said that when it was removed, the nurse saw that it was moving and took a picture. Would it be possible that it would be moving?

A Oh, yes, no doubt. With that size of the arms and of the limbs, already the muscles are already functioning. I could not say that it could really swim. It can swim at eight weeks. At eight weeks it has a movement of stroke inside the bubble. At this stage, which is four weeks, I don't think it can swim, but it moves, but the movements are not as complicated as swimming.

Q Doctor, our courts spoke ten years ago of a concept of right of privacy, and the right of a mother to privacy of her body, her own body. Is what we see on the screen a part of the mother's body, like an appendix or a kidney, is that part of the mother's body, when it is still in her body, even?

A No. It is not at all a part of the body of the mother. It is an early human being who needs the protection of the mother. That is a very different thing. Now, for example, the winter is very severe here in this country.

If you went outside during the night, you would possibly die. Now, if you were inside a house, you would possibly survive. Now, does the house—do you become a part of the house because you are protected by the house? No, you are not a part of the house, but you need its protection.

And I would say that we know even that it is the baby who takes the—from the mother, because around one week after fecundation, it is manufacturing a special hormone which is sent to the blood of the mother to prevent the next menstruation, because if there was menstruation the baby would be rejected. And it is the baby at one week after conception, which sends a message to the mother, stop your menses so that you keep me at home.

And then you see that he even is commanding his mother from the very first week of his life, and he forces his mother to do what he wishes, so to speak, that is to protect it.

And you know that babies do that for a long time after birth, forcing their mother to do a lot of things that the mother dislikes, but just for the protection of the baby.

Q Doctor, you had said something about, everything that is necessary for the brain is there in the very beginning mo-

lecular stage?

A Yes.

Q So, if you are saying that the baby is controlling throughout the pregnancy, is that what I understand you to mean?

A Yes, that too.

Q You are saying that the brain is the computer that is sending these messages and signals?

A Oh, it is too complicated, Your Honor. The brain is building himself, and what is the computer is the whole genetic information which tells the cells how they should manage to build the computer. The very extraordinary process of life is that it does not come from outside. It comes from inside. And then you ask me a too difficult question, you ask me whether the brain of the baby is calculating the kind of hormone it should do. What I know is that the baby is doing that. Whether he does it with the glands or anything like that, we still do not know.

Q Doctor, if we can see the next slide. I don't remember what it is. I don't know if we need that or not.

MR. PALMER: What is that, Dr. Carlton?

DR. CARLTON: Seven weeks in the spherical sac that the doctor described, except once again the placenta attachments that come off the surface of the sac that you see have been removed so that the picture can be taken. They pretty much surround the sac earlier on, but one can see the umbilical cord, the "astronaut hooked to the mother ship" that the Doctor has alluded to.

THE WITNESS: Definitely.

BY MR. PALMER:

Q Dr. Lejeune, does that fairly and accurately represent—

A Exactly the early Tom Thumb. What I spoke about is one week older than him, but looking at him one week earlier than in the picture, that is not totally finished. Tom Thumb is just right there. The size is that.

Q Doctor, you said that Tom Thumb dances on, like a trampoline in utero.

A Yes.

Q Do you mean that he actually can control his own legs and muscles?

A Yes, that is what he does, yes. He makes the flexion of his—and then he presses on the wall, and then he springs and because the buoyancy of the fluid, his movement when he falls down is very slow and very gentle and very graceful, and only cosmonauts can do that because when they are on satellites they don't feel the gravity, so that when they jump, when they fall down after jumping, they fall down very gently. It is exactly like a tiny baby, Tom Thumb, playing trampoline.

Q Now, you indicated in your testimony, "if we touch his lip with a hair" -

A At two months of age, we are sure of that.

Q How do they do that?

A It is at the moment of those interventions for extrauterine pregnancy, and just at the moment you are opening the sac, that if you have not removed and not clamped the arteries that give the blood to the placenta and life to the baby, the baby is just perfectly alive during the beginning of the intervention. And if you just touch its upper lip, it will move.

Q And then, for me to think about it, if I touch with a pencil I feel it. If I touch harder, I feel pain. Does a tapping sensation—is that what you are saying?

A Oh, no doubt. But that is necessary because nature is

doing everything in view of the life in the outside world. So that, building the nervous system around the lips is very necessary to begin with, so that everything is ready when the baby goes out so that he can find the nipple. It is that much that, at two months and a half, it begins to suckle its thumb in utero. At three months of age they are sucking their thumb the whole day, because they are beginning to learn how to suck and they need that when they will be out of the uterus.

Now, there is one word I would add, Your Honor, which is that this fantastic development of the early human being is made at the expenses of the resources of the mother, and it costs biochemically a lot to the mother, even at the beginning of the pregnancy. That is the reason why, for example, breasts begin to be tense, and increase, and they have difficulty with digestion, and there is a very curious syndrome we know very well, which is that the baby is taking, so to speak, the best of the blood of the mother for this very refined food that we need to build a new human being.

So that, mother is deprived of some minerals and especially from some vitamins which are very important to her, and in our countries, especially in the United States, most of the mothers in the beginning of the pregnancy have a deficiency of various vitamins including folic acid. And we know that those deficiencies can produce a kind of depression syndrome, some difficulty to cope with the general situation, which renders more fragile, the mother, and the beginning of the pregnancy. And that is the reason why the mother needs enormous care and enormous protection, and much better nutrition from the very beginning of the pregnancy, not only when the baby is big and writing poems, but even at the very beginning the mother needs the best care we can give her and the best food we can give her, and very generally in all our countries there is nutritional deficiency at the very beginning of pregnancy and then a difficulty psychologically for the mother to go over this physical and neurological difficulty that she can feel.

And that is the reason why the society must help the early mother to overcome those difficulties.

Q Doctor, returning to the type of sensation which if I press more I feel pain, does Tom Thumb feel pain? Does he feel the pain of an abortion, for example?

A That is a very difficult question, Your Honor. I do not know if you, Mr. Palmer, you feel pain, because I can hurt you, I would suppose you feel pain, but I have no proof of that. The only proof I can have, that you begin to cry. You begin to try to prevent the assault which produced the pain.

Now, we have to realize that the feeling of pain is something which is our own psychological experience. It is not transmissible, a transmissible experience. Now, Tom Thumb, we are entirely sure just as we are entirely sure that another member of our species will feel pain when receiving some painful treatment, just the same. But that is deep psychology. He surely feels, there is no doubt.

Q So, when we speak of Tom Thumb, Doctor, when in your medical judgment does Tom Thumb's life begin? When does human life begin?

A It begins like everything, at the beginning. And the beginning is conception.

Q When are we a person, first?

A Well, a human being—now, we call later the human being—what do you call it, a newborn. You call it a schoolboy. You call it a GI. You call it senile. You call it an old man. But it is the same person, during the whole process who has been a preborn baby, a newborn baby, a schoolboy and an old man. It is the same person.

And the reason why it is the same is because its genetic makeup, which is defining him or her, has been there from the very beginning. So that, when we speak about one living being, one individual, no matter whether we are calling him a schoolboy or a person, genetically he is still the same being. He was there from the very beginning, because if he had not been at the beginning, he would never have been there.

We are entirely sure that a fertilized egg containing gorilla chromosome will never become a human being, will never

become what we call a person. It will become a gorilla then. And that is what I can say on this question.

MR. PALMER: Could we see the next slide, kindly, Doctor.

THE COURT: Would you move that projector a little further away from the microphone. It apparently is causing some problem.

MR. PALMER: Can you tell us what that slide depicts, Doctor?

DR. CARLTON: This is the eight weeker that Dr. Lejeune, I think, has described. You can see the complete development here of the lower extremities, and all the organs and systems that the Doctor testified, that we enjoy the use of, are fully in place in this preborn child.

BY MR. PALMER:

Q Just to repeat, Doctor, that fairly and accurately represents that?

A Yes.

MR. PALMER: Thank you, Bill. We can turn off the machine.

MR. PALMER: If Your Honor would have any further questions, that would be all I would have of Dr. Lejeune.

THE COURT: Do you want to ask any questions?

MS. COLEMAN: No.

THE COURT: Doctor, let me simply see if I understand what you are saying. You have indicated that this preborn baby, or fetus, however you want to call it, has some viability itself, separate and apart from the viability of the mother, but can it exist outside of a womb or another protective device similar to that, in order to provide it firstly the fluids and secondly the protection from temperature changes or radiation or anything of that sort?

THE WITNESS: In the present state of the technology, we cannot supply the fluids and the protection that a human body can supply. But to make you understand, if I can, Your Honor, I would say that we can make an in between experiment which has not yet been done, which could be a mouse, to take an embryo of a mouse in vitro, and to implant it inside the abdominal cavity of a male mouse, that only the supply would be given and not the hormones. And my guess—the experiment has not yet been made—my guess, my informed guess on what we know in biology, would tell us, well, this would supply enough fluid and protection for the baby to grow to normality, for the mouse baby.

I do not propose at all to do that in our species, but that will be to demonstrate that it would have the supplier of the fluids. Then the situation is found, the viability depends only upon our technical ability to give the supply of vital fluids, exactly like to the first man on the moon. If you stop the vital fluid, it will die on the moon. If you have enough fluid, it will live and come back to earth.

THE COURT: Someday we may have the dream of the second child being carried by the male.

THE WITNESS: I would say it is a nightmare. I would not—I have been reputed, Your Honor, in newspapers, the newspapers as having invented the pregnancy in males and that is perfectly untrue. I refuse absolutely that paternity. I like ordinary and honest paternity, not the artificial, I was talking about.

But for more than one reason of convenience, what I believe, and that is a belief as a geneticist, that if nature had taken the step that if the mother was the recipient, women must have in their genetic makeup something more than the men do have, to make them understand that tiny human beings are beings of human kind, and there must be some very—I would say illogical but deeply logical feeling in the female nature to understand the respect to life that we men would have to learn the hard way, of science.

THE COURT: I have no other questions.

BY MR. PALMER:

Q Doctor, you just used again the word "science." In your paper on "In Vitro" in the British government that has been introduced here today—if I may, Your Honor, I had meant to introduce—I think the microphone picked it up—the Life Magazine article—you made reference to, "sometimes poets and writers have greater vision than scientists." Can you explain what you meant by that?

A Well, I made reference to two great writers. One was Aldous Huxley because he said that, in his "Brave New World," that we would have factories to make babies in bottles and make line production of the special type of mankind to be used in factories and so on.

Now, what he says is one thing remarkable, that in his Brave New World, in which all sexual behavior was allowed and encouraged since infancy, no matter whether hetero or homosexual or anything, in which every dirty word was in everyday use and encouraged in the school, they were nevertheless obliged to rewrite all the literature because they wanted to expurgate of one obscenity, one dirty word, one word that should not be read, which should not be spoken, which should never be heard, and this word is the word "mother." That word, in the Brave New World, was the only dirty word left. And this reversal of the value makes me feel that those poets see deeper than we see, we scientists, that if we try to masquerade nature that then we would reverse the value and that motherhood becomes an obscenity. Is it proper reversal of a value? That is the reason why I quoted that.

But another I quoted was Vulcan from Goethe, possibly the greatest poet in human history, and when he wrote his history of Faust, the damnation of Dr. Faust is the story of the beloved seduced, pregnant, and abandoned, and the whole story of the damnation of Dr. Faust is the story of an abortion. And in the second poem about Faust, he even invented fertilization in vitro, and Faust and Mephistopheles, his diabolic companion, come back to the house of Dr. Faust and they look at the scientist—he is called Mr. Wagner, who is building an humonculus. That is a tiny human being in-

side a bottle.

It is from that moment that Dr. Faust becomes entirely mad, invents an impossible love with a ghost of Helen of Troy which is not real love, it is not real babies, and finally he gives these two last orders and they are very important for our own civilization. He said to Mephistopheles, "You have now to silence that tiny church bell, the only one which is still ringing in my empire, and you have to destroy this little cabin in which two old people living there, Filemon and Baucus, who are the paragons of human love."

And Mephistopheles goes, and the bell does not ring any longer, and when he comes back after burning the two old people in their cabin—that is, destroying the love of God and the love of humans—then sorrow comes inside the heart of the doctor.

We have to realize, we modern Fausts, that we have to respect those two loves that make the truth of our lives, and to respect especially those two hearts who are beating together, which is the beginning of our symphony.

MR. PALMER: Thank you, Doctor. Thank you for coming all the way from France.

THE COURT: Thank you, Doctor.

We will take a ten minute recess.

THE CLERK: All rise. The Court is in recess for ten minutes.

(Recess.)

MR. PALMER: Call Dr. Bernard Nathanson.

Whereupon,

BERNARD NATHANSON, M.D.

was called as a witness and, first having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. PALMER:

Q State your name and address for the record, Doctor.

A Bernard Nathanson, 230 West 22nd Street, New York City.

Q And you are an M.D.?

A Yes, I am.

Q And what is your profession, Doctor?

A I am an obstetrician and gynecologist.

Q And would it be correct to say that you are licensed to practice medicine?

A Yes, in New York and Pennsylvania.

Q And are you Board certified?

A Yes, I am.

Q Give us your medical background, your education and your schooling and training, Doctor.

A Yes. I was graduated from the McGill University College of Medicine in 1949 in Montreal, Canada. I spent a year as a rotating intern at the Michael Reese Hospital in Chicago, a year as a surgical intern at the New York Hospital Cornell Medical Center, a year as a resident in urology at the New York Hospital Cornell Medical Center, and four years of obstetrics and gynecology residence at the Woman's Hospital in New York City.

Somewhere in there I was two years in the United States Air Force as Chief of Obstetrics and Gynecology at the Northeast Air Command in Newfoundland.

Following the conclusion of the various residencies and training, I entered private practice and simultaneously undertook teaching at the Cornell University Medical College, with which I have been continuously associated for 26 years.

Currently I am Assistant Clinical Professor at Cornell. From the years 1973 to 1977 I was the Chief of the Obstetrical Service at the St. Luke's Hospital in New York City, which is a teaching unit of the Columbia College of Physi-

cians and Surgeons, Columbia University's medical college, and I am still associated with that university as well.

I am a member of the American Medical Association, the New York State and County Medical Society, the American College of Obstetricians and Gynecologists, the American College of Surgeons, the New York Academy of Medicine, the New York Academy of Sciences, the Royal Society of Medicine, and many other scientific organizations.

Q Your publications, Doctor, any publications that you have—

A Yes, I have published approximately 15 or 16 scientific papers and two books.

Q What I was going to ask, what are the titles of the books?

A Yes, one book is called Aborting America, which was published in 1979 by the Doubleday Company, and a more recent book called The Abortion Papers which was published by the Frederick Fell Company in New York City.

Q Doctor, now I am familiar with the first book you mentioned. I would like to ask you, from our knowledge of that, what was your initial position on the question in this nation of abortion, and were you—did you begin an organization, and what was the evolution of this?

A Well, I suppose I was as responsible as any single person in the United States for the uncaging of the abortion monster in this country. I was the organizer, or at least one of the three or four organizers, of the Abortion Rights Action League in 1968.

Q Then you are saying you are pro-abortion in that sense?

A I was strongly pro-abortion. I was very active in the political arena on abortion, and in the bioethical area in general, and for several years was active throughout this country, speaking and testifying, working in legislatures, on the pro-abortion side.

When the law was struck down in New York State in 1970, I organized and ran the largest abortion clinic in the world. It was called the Center for Reproductive and Sexual Health. The acronym is CRASH. And at that clinic I had 35 doctors working under me. We functioned every day in the week including Sundays, from 8:00 in the morning until midnight, and we did 120 abortions a day, every day in the year except, I believe, Christmas Day when we were closed.

In my two year hegemony in that clinic, we performed 60,000 abortions, which is still the largest single experience with abortion in the world, or at least in the Western world. So that, for a period of approximately seven or eight years I was very active in pro-abortion politics, and on the scientific and medical side of abortion.

Q Was the safety record, or track record of this clinic you have mentioned, Doctor, in New York, cited by the Supreme Court in Roe v. Wade?

A Yes. It was cited in a number of instances in that decision when the procedure itself was discussed and its safety was considered, yes.

MR. PALMER: We would ask, respectfully, Your Honor—we would proffer him as an expert in obstetrics and gynecology.

THE COURT: I will accept his qualifications.

BY MR. PALMER:

Q Doctor, based on the testimony we have had here today, that the preborn child of Mr. and Mrs. Coleman is approximately six weeks' gestation, do you have a medical opinion as to whether or not that preborn child is a being, a person, a fish, an animal, whatever is it not, and as to whether or not it is viable and if so, would you explain that to His Honor.

A Yes, I do have such an opinion. My opinion is that this child at six weeks is a person, a human being. It is viable and it, in my opinion, requires all the legal and moral protection

that we can afford it.

When I underwent my apostasy on the abortion question, in 1974, it was as the result of leaving the abortion clinic job or directorship in '72 and—

Q Let me interrupt you, Doctor. Excuse me, but it may be important for His Honor. You used the word "moral." If I were to ask a personal question, what is your religious background and—

THE COURT: Let's not get into that. I am interested only in the viability question, not the catharsis or anything else.

BY MR. PALMER:

Q Would it be fair to say you are an atheist?

A That is correct.

Q Would you continue, Doctor.

A Yes. When I left the abortion clinic, I took up the position of Director of Fetology and Chief of the Obstetrical Service at the St. Luke's Hospital in New York City. This was in 1973, which marks the advent of the modern science known as fetology.

It was in that year that we introduced into clinical research and use, modalities and techniques and technologies known as ultrasound electronic fetal heart monitoring, hysteroscopy, fetoscopy, immunochemistry, amniocentesis, and a great many other of the technologies which now are collectively termed the instruments of fetology.

I spent four years directing that unit, conducting research, and carrying out teaching responsibilities in that area, and it was in 1974 that as a result of these new perceptions of the fetus which we were afforded with these new technologies that I began first to question the ethical permissibility of the elective or non-medically indicated abortion, and I articulated those doubts in an article in the New England Journal of Medicine, an editorial article.

My work in fetology continued for another two years, during which time we were amassing literally an enormous vol-

ume of material on the issue, and it was becoming more and more plain, more and more impossible to deny that with these new perceptions, with what we now knew about the fetus, that we could no longer continue to regard it as something of a second-class citizen or a piece of meat or something which was not important.

It now was clear that it was biologically indistinguishable from any of us. It has all the same functions, all the same capacities, and in 1979 I crystallized my opinions regarding the impermissibility of abortion in the book, Aborting America.

As a result of the technologies and the new perceptions of these technologies which were afforded, a new view of the fetus as of ten years ago, as of 1973, many observers, and I of course concur with them, have postulated that every human being goes through a phase in its life, his or her life, called prenatality. This is the time before we are biologically cast out into the outer world. But there is no question that as we study that period in greater and greater depth we are convinced that this is just one more phase of man's existence on this earth.

It is a relatively new concept, prenatality, a nine month period of developing ourselves, developing our perceptions, our sensations, our thoughts, our dreams and our fears. But there is no doubt any longer in the minds of those of us who have worked in this area that prenatality is a reality, it is a real phase of our lives.

I would remind Your Honor that until the mid-nineteenth century, childhood was not even recognized in the law or otherwise as a true phase in our lives. At the age of seven children were cast out into the world to fend for themselves or work in factories, and we had no clear understanding of what childhood was about until probably the 20th century.

We are now almost into the 21st century, and that will be the century of prenatality, that we will begin to understand that that is a real, palpable phase in our lives, one to be respected as childhood is now, and one as important, if not more important, than childhood, and it must be protected by all the means which are at our disposal.

Q Doctor, would you care to tell us when the new science of in vitro fertilization that Dr. Lejeune told us something about, whether or not it has had an impact on the definition of viability.

A Well, in vitro fertilization and its offspring, embryo transfer, have allowed us for the first time to witness the creation of life. Much of the waffling and dithering about abortion and the question of its ethical permissibility has long centered on the issue of when life begins. And there has been a great deal of miasma and cloudy opinion on this subject. And many people have said that it is a philosophical or religious or theological or even an economic consideration.

In point of fact, we now know exactly when life begins. It begins when the sperm meets the egg. We have been witness to it in the laboratories now. We see it happening. And there is no longer any question of doubt as to when life begins.

It is very much on the order of one wondering when a fire begins. If there is a conflagration raging in the city, we know that at some point a spark was lit and the fire began, and we now know in biology that it is at the moment that the sperm meets the egg that the spark is lit, the fire is on, the continuum is established, and that will not die out until the biological life dies.

The biological life is an immense spectrum, the bounds of which are named as prenatality, infancy, childhood, adolescence, adulthood, senescence and so on. These are only bounds in that continuous spectrum.

So that, with in vitro fertilization, we have now clarified beyond any serious dispute, exactly when biological life begins. Now, there are many people of other persuasions on this issue who will say that life, or a mere human being, is not a person; that a person is a social entity, that a person requires bonding to another person, or some kind of meaningful relationship to another person.

After this has been investigated, this question, very recently in an article published in the New England Journal of Medicine just a year ago by two researchers, one of them here in Washington at the National Institutes of Health by

the name of Fletcher, and an obstetrician named Evans, Mark Evans at George Washington University.

What they did was quite simple. They had women who were applying for abortions at an abortion clinic subject themselves first to ultrasound examination, at which time they could see the six week or five week or seven week fetus on the ultrasound screen, and they interviewed these women following this experience, and in every case those women who had, prior to the examination, committed themselves to abortion for various reasons and were prepared to undertake it, turned their backs, changed their minds and left.

The conclusions of Fletcher and Evans were that these women had bonded themselves to their fetuses after seeing them on the ultrasound screen, and the further conclusion of that, of course, was that if one bonds to someone else, then that someone else is a person, not just a human being or a life, but an actual person who has now established some meaningful social relationship with another person.

Taking off on that, a researcher named Utien in Cleveland, who is the head of the in vitro fertilization unit at the Mt. Sinai Hospital in Cleveland, has recently published, again in the New England Journal of Medicine, an article in which he pointed out that women tend even to bond themselves to the dividing egg after the in vitro fertilization has taken place, and if the egg does not continue to develop and live, these women have said that they feel as if they have suffered a stillbirth.

But more interestingly, Utien also points out that the workers in his team of in vitro fertilization, the workers themselves, the nurses, the technicians, the doctors, when one of these dividing eggs would die and not survive, they found themselves profoundly disappointed and they concluded that they had actually bonded themselves too, to this dividing egg; that the dividing fetus, the early, early embryo, provoked feelings of bonding not only in the mother but in the technicians and people who were working in the in vitro fertilization team themselves. And in a sense, of course, this shows us that even that early dividing zygote, that blastocyst, the embryo, has the capacity to bond to other human

beings, and it is simply undeniable that this must also be regarded then, as not only a human life but an actual person.

Q Doctor, when you speak of this bonding and this ultrasound, to me that means seeing is believing, is that—

A That is correct.

Q Can you describe for His Honor what this ultrasound procedure involves? Is it invasive? Is it radiation like an X-ray? Is it harmful at all to the mother? What is it; what happens when—

A No, ultrasound was developed in the 1950's. It is a technique in which high-frequency sound waves are passed through the mother's body and the echoes are gathered into a computer and a picture is made exactly of the contents of the body, including the contents of the uterus.

Ultrasound has been probably the most rapidly proliferating technology in the last ten years. It is used literally in all branches of medicine now, from neurology and neurosurgery of the brain through pediatrics and obstetrics and so on.

It is, to the best of our knowledge, harmless. It consists merely of placing what is called a transducer, an instrument on the mother's abdomen, and moving it back and forth, transmitting the sound waves through the mother's body, and gathering the echoes back. It takes perhaps five or ten minutes. It is totally noninvasive. And it is remarkably, astonishingly accurate.

We now have, instead of static pictures, in 1976 the technique of real time ultrasound in which the pictures now are continuous. It is like a motion picture camera, so that we can put the transducer on the mother's abdomen and we can actually watch the five week fetus's heart beating, that is, a three week old fetus—obstetricians speak in terms of the pregnancy from the first day of the last period—but actually the three week old fetus's heart beating. We can see the four week old fetus's extremities moving. We can see the five week old fetus putting its thumb in its mouth. We can watch, literally, all of the functions of that very early young person.

The technique is simply mind-boggling. It is now being produced in color. And the potential of this particular technology is simply limitless.

Q Doctor, I was just—while you were explaining that to Your Honor, I was asking Dr. Carlton if we have such a device in this community and he tells me that we do, so this isn't limited just to—

A Oh, no. This is a common practice over the entire United States.

Q So, you are speaking of a bonding that these mothers see, and then they change their mind and walk out, seeing is believing. Assuming today, if the mother was desirous or wanted to, or would ask you, with Your Honor's permission, would go to Holy Cross, would it be—are you saying this is something that she can see if she wants?

How long does it take to do it? What is involved?

A Absolutely. The screen can be placed right in front of the mother. It takes perhaps five minutes or less.

Q Can you describe what she would see at six weeks?

A Yes. She would see the heart beating. She would see the perfectly formed, very small person, including the extremities moving. She would see the child rolling over. She would see literally everything that one associates with a human being who is living and functioning.

Q In your opinion, Doctor, if you know, does a child of six weeks' gestation feel sensation or pain?

A Oh, yes. We have good evidence for that now. We know that if you stroke the lips of a six-week child, it will move away. If you touch the palms of the hands, it will pull its hands away. These methods have been carried out, or these things have been carried out under ultrasound technique.

Q Does it have taste? Can it hear?

A Taste buds appear at about seven or eight weeks.

Q How do you know?

A We know that from examination of the tongue itself.

Q Can you sweeten the fluid or something?

A No, but we can examine the tongue of the fetus and we can identify the taste buds there. The fetus begins to swallow at about six or seven weeks, so we know that it is having gastrointestinal activity.

Q Can it hear you and I talking? Does it respond to music?

A Yes, we have done some work in that, and we discovered that if we put a fetal heart monitor on the fetus, that is, an instrument which will record the beat to beat rate of the heart, and we blow an automobile horn, the fetus will get frightened, its heart rate will speed up and it will jump around. However, if we play some chamber music from Mozart, it seems to be quite soothing.

But, there is no question that the fetus can distinguish between sounds, and in fact this technology, or apercu has been capitalized upon. There are companies which manufacture little devices which mimic the maternal heartbeat and they are used for babies who are fretting. If you put this heartbeat of the mother on a tape into the crib of a baby who is fretting and crying, frequently they will stop crying. They know that sound. They heard that for many months before they were actually born. And this is a commercial instrument in use in nurseries and in homes.

Q So then, Doctor, you mentioned your clinic did 60,000 abortions in the two years that you presided over it?

A That is correct.

Q How many, personally, have you done in your practice?

A Well, I personally have done about 5,000. I have supervised another 10,000 done by residents under my direction in

hospitals, and I was responsible as the director of the clinic for 60,000, so I have about 75,000 abortions in my life.

Q Up until what stage of pregnancy, to your knowledge, are abortions done in the United States?

A Well, we have evidence that abortions are being done well into the 30, 31, 32 week, 33 week range. I myself opposed the abortion of a 33 week pregnancy at one of the hospitals at which I work. I placed myself directly in front of the procedure, as it were, and in defiance of the chief of the service, the salaried administrative director of the service, and as a result I was removed from certain teaching duties because I opposed the 33 week abortion. But I have no regrets over that intervention.

Q Doctor, of the 5,000 that you personally have done, let me bring you back to the instant time frame. How many have you done at approximately six weeks?

A The bulk of the 5,000 I personally have done would have been at six weeks.

Q Can you describe the procedure? How is it done?

A Yes. The procedure is done by taking graduated metal instruments called dilators, putting them into the cervix of the woman, and gradually opening the cervix. The cervix is the neck of the womb. It is normally closed tightly. If one puts progressively larger tapered steel instruments through that small opening, one can progressively open it sufficient to introduce a hollow tube which looks much like a straw, into the uterus, and at the other end of the straw, a vacuum force is applied and the force literally sucks out the products, the unborn child.

The child is sucked out in pieces and the pieces are collected in gauze bags to be sent to the laboratory for analysis.

Q In your opinion, Doctor, is there a sensation of pain in this preborn child?

A Yes. I think we have sufficient evidence that the child

is developed enough at six or seven weeks, certainly to feel the pulling, the force of the vacuum, and the ripping away forcefully from the wall of the uterus.

I must say that I have lived through the development of a great deal of technology. We cannot hear the child cry. We don't know the child feels pain for certain because pain is subjective. But I have no doubt that within the next ten years, technology marching forward inexorably as it will, we will have that capacity to know those things, without question.

Q Doctor, how far has technology about the preborn taken us since 1973?

A Well, let me put it in perspective this way. When I was a medical student in 1949, we used a textbook called Williams' Obstetrics. It was in its eighth edition at that time. And it had in it about 22 pages on the fetus.

The last edition of Williams, the 16th edition, came out three years ago. It is a 750-page book just like the other one was. But it has approximately 300 pages on the fetus.

The science of fetology has exploded exponentially in the last ten years. We did not know anything about fetology ten years ago, but it today is perhaps one of the most flourishing, the most dramatic, sciences we have. Ten years ago, if one consulted the Cumulative Index Medicus, which is a volume listing every scientific article that is published in the world in any language, if you consult the 1973 Cumulative Index Medicus you find about 100 articles a year on the fetus.

If you consult the 1983 Cumulative Index Medicus, you will find somewhat in excess of 3,000 articles a year on the fetus. The science has developed beyond our wildest dreams. The technology is pressing forward. This science, and I do not mean to make a pun, is in its infancy and ten years from now it will be enormous beyond our wildest dreams.

Q Doctor, of course as you yourself—I know from reading the book that you have written, and the Supreme Court's cases themselves, although of course you are not a lawyer but you understand the language as any layman would?

A Yes.

Q Initially the sign of viability is the ability to exist by natural or artificial means outside of the womb. Was in vitro fertilization invented in 1973?

A No, it was not.

Q When was the first in vitro child, if you know, born in the world, Louise Joy Brown, I believe, in Britain approximately—

A Yes, I believe Ms. Brown was born in '78 or '79.

Q Are you familiar with Justice Sandra Day O'Connor's writings of the dissent in the most recent case of a High Court, Akron, in which she indicated that Roe was on a collision course with itself because it left a window of viability, and viability was held to be something that must be defined at the level before—by properly adduced medical testimony, and it was to evolve with changing medical science.

What implications, then, do you see—is the medical world now willing to communicate to the judicial world?

A Yes, I am familiar with Justice O'Connor's dissenting opinion. Again, I will refer to my own personal experience when I was a medical student in 1949, viability was defined as a fetus at 32 weeks.

We had none of the technology which one finds now in premature intensive care unit nurseries. We had no respirators. We had no arterial blood gases. We had none of the technology, the monitoring systems, nothing.

Today viability—now, this is 30 years later, 33 years later—viability is down to about 23 or so weeks. We have marched it back ten weeks in those years. Now, I don't expect that it will take another 35 years or so to march back ten more weeks, because the technology is progressing geometrically, not arithmetally now. It is exploding.

I predict, and I think that I can stand well and firmly on this prediction, that within five years we will have the technology to keep eight, ten, and twelve week fetuses alive. The technology is almost in place to take the six or eight week

fetus off the wall of the uterus of the pregnant woman, put it into a life support system, and allow it to flourish extracorporeally, outside of the woman's body, for the remainder of the pregnancy. That technology is almost perfected. It is a short step away in this Orwellian year of 1984.

Q Doctor, when you say 23 weeks viability, you mean—let's see, that is a little over five months. Babies can be born that premature and you have an incubator good enough that can keep them going?

A That is—

Q Totally on their own? Now, the other—back at the other end of the gamut when we were addressing viability by demonstrable scientific evidence, by means of in vitro fertilization, this existence in the petri dish extrinsic to the womb, fertilization taking place extrinsic to both parents, in your medical judgment does that then satisfy the definition of viability by artificial means, the incubator, the petri dish?

A Yes. As I indicated to you, viability now is at 23 or so weeks. Actually, that is about a 600 gram infant and about 75 percent of those are now surviving.

We are moving viability in two directions. We are moving it backwards from term pregnancy to about 22 or 23 weeks, and we are moving it forwards from in vitro fertilization. And again, I have no doubt that within a few years those two movements will collide, as it were, and we will be keeping fetuses alive from the test tube on outside the mother's body.

I think that that technology is, again, almost in place.

Q But Doctor, as to the time when it will be done, when we will have artificial wombs, and then the man that says, "I'm from Missouri, show me," he will see it, are you able to state, as a medical theory, from just what you see and observe, that, yes, it is possible, it is just a matter of when we are going to do it or can do it if we want to do it. Is that what you are saying?

A Yes. Even the question of viability is a relative one in

the sense of viability where. I mean, viability here in Washington is different than viability in Zaire. You want to know when, that is to say low long, how do you define viability, is it only 30 seconds out of the uterus, or is it ten years? Whose viability?

These questions are all such relative questions, but there is no doubt that the whole issue of viability is now, at least in scientific circles, moot. We are in such a state of flux, of transition in science because of the explosion of technology, to say, well, it is moving backwards so fast that 1984 may see it moved another two weeks. We don't really know.

It is a science which is progressing so rapidly that no one any longer even speaks confidently of viability.

Q Doctor, one other question, I can't help it but I always wanted to ask you, having read your book, because I know your background is of the Jewish faith and you freely admit in the book and have said that you are an agnostic, or of atheist persuasion now. And if you performed, individually, 5,000 abortions, and if you headed the world's largest abortion clinic, and if you founded the National Abortion Rights Action League, and if you almost singlehandedly were responsible for Roe v. Wade, why have you made this reversal?

Is it based on science; surely not religion—what is it? Why?

A Mr. Palmer, it was an apostasy based purely on science. I was told as a medical student, we were all told that there was a baby in the uterus, there was a product of conception, there was something. But that was an article of faith and I don't believe I ever fully accepted it, but I did know that in those days we had problems with women who were having illegal abortions and there was no countervailing force then, in my ethical equation there, that—to legalize abortion then would save many women suffering and mutilation, and there was no other force on the other side.

But in 1973, when fetology became a science, when we began to see and hear and communicate with the prenatal person, then that countervailing force became established and it became a very strong, undeniable moral force in the

equation, and I could no longer sanction the protection of women's political rights over the overriding right to life of that prenatal person. And that is when I changed my mind.

Q Thank you, Doctor.

MR. PALMER: If Your Honor would have any other questions of Dr. Nathanson.

THE COURT: Mrs. Coleman, do you want to ask any questions?

MS. COLEMAN: No.

THE COURT: Nor do I.